

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT FIREMAN and ANN RAIDER,

Plaintiffs,

v.

Civil Action No. 05-11740-MLW

NEWS AMERICA MARKETING IN-STORE,
INC.,

Defendant.

**SECOND DECLARATION OF GORDON P. KATZ
IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

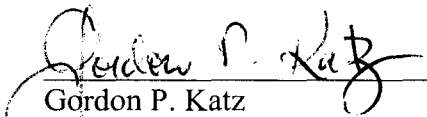
I, Gordon P. Katz, on oath, depose and state as follows:

1. My name is Gordon P. Katz. I am a partner at Holland & Knight LLP and counsel for defendant News America Marketing In-Store, Inc. ("NAM") in the above action. I make this declaration upon personal knowledge.

2. Appended hereto as Exhibit A are true copies from the pages of the unedited deposition transcript of David DeVoe, taken on June 13, 2007 in New York City.

3. Appended hereto as Exhibit B is a true copy of an email from Les Charm, Plaintiffs' representative during the negotiations of the 1999 Stock Purchase Agreement.

Signed under the penalties of perjury this 22nd day of June, 2007.


Gordon P. Katz

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 22nd day of June, 2007.

/s/ Gordon P. Katz
Gordon P. Katz

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EXHIBIT A

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UNCERTIFIED TRANSCRIPT

DISCLAIMER IN THE MATTER OF

ROBERT FIREMAN and ANN RAIDER,

v.

NEWS AMERICA MARKETING IN-STORE, INC.,

The following transcript of proceedings, or any portion thereof, in the above-entitled matter, taken on June 13, 2007, is being delivered UNEDITED and UNCERTIFIED by the official court reporter.

The purchaser agrees not to disclose this uncertified and unedited transcript in any form (written or electronic) to anyone who has no connection to this case. This is an unofficial transcript, which should NOT be relied upon for purposes of verbatim citation of testimony.

This transcript has not been checked, proofread, or corrected. It is a draft transcript, NOT a certified transcript. As such, it may contain computer-generated mistranslations of stenotype code or electronic transmission errors, resulting in inaccurate or nonsensical word combinations, or untranslated stenotype symbols which cannot be deciphered by non-court reporters. Corrections will be made in the preparation of the certified transcript, resulting in differences in content, page and line numbers, punctuation and formatting.

This realtime uncertified and unedited transcript contains no appearance page, certificate page, index, or certification.

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2 what they thought they needed to run the business.

3 Q. Okay.

4 And are you able to recall the
5 details of any of those conversations?

6 A. No.

7 Q. Did those communications typically
8 occur over the telephone or in person?

9 MR. KATZ: Objection.

10 A. I don't remember.

11 Q. Okay.

12 were there multiple communications to
13 the best of your memory?

14 A. To the best of my knowledge there was
15 a lot of dialogue with Mr. Les Charms.

16 Q. Okay. And I think it's actually
17 singular, Charm.

18 (Whereupon, a discussion was held off
19 the record.)

20 Q. You understood Mr. Charm to be whom?

21 A. I understand he was representing Ann
22 and Bob along with Goodwin Procter, I believe.

23 Q. Was he your primary contact on the
24 CCMI side relative to negotiating business terms?

25 A. Yes.

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2 Q. were there other people with whom you
3 discussed and negotiated business terms?

4 A. I believe we had calls where Les was
5 on the call along with Ann and Bob and I would be on
6 the phone with Jon Rubin, and there were other
7 calls, I guess, where our respective outside
8 counsels also were involved in dialogue.

9 Q. Do you remember having any -- and
10 this is leading up to the August 13th, 1999
11 execution of the stock purchase agreement -- did you
12 have private communications with either Ms. Raider
13 or Mr. Fireman?

14 A. I don't recall.

15 Q. You don't recall one way or another?

16 A. No.

17 Q. I take it from your previous answer
18 there were a number of conversations that you
19 participated in relative to the business terms?

20 A. Conversations and email if I
21 remember.

22 Q. We'll get to the documentation
23 shortly but does anything stand out in your mind as
24 being particularly memorable relative to your
25 discussions with Les Charm concerning business

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2 terms?

3 A. The only thing I would point out is
4 because we were getting near the end of the deal and
5 we were going to make a decision on whether we were
6 going to proceed or not to go forward with the -- we
7 were in the process and we had been negotiating for
8 a while and we just had to decide if we were going
9 to get the deal done or not.

10 There was a term that Les objected to
11 fairly strongly in the document that enabled
12 News America to have significant flexibility on how
13 they ran the business and I remember Less stating to
14 Ann and Bob that he thought this was problematic and
15 letting them know that he wasn't sure if they should
16 go forward under this because he thought it could
17 impact their ability to run the business.

18 I think at the time we talked about
19 why we needed it, and at the time I think our view,
20 we told him, is that we were trying to move forward
21 on the business and we were hopeful that we were
22 able to build the business together going forward
23 but ultimately we were buying the business and we
24 needed flexibility and in how we were going to run
25 the business.

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2 That was a critical point as we got
3 near the end of the deal and it's just memorable
4 because I think it was kind of it was either we were
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5 going to do the deal or we weren't going to do the
6 deal. That in particular was a concern for them.

7 Q. Now, was this a single conversation
8 to your memory or was this a series of
9 conversations?

10 A. The conversation I remember was a
11 conference call. I think it was Jon Rubin and
12 myself in my office in, I think it was in Norwalk,
13 Connecticut at the time, and I believe Les, Ann, and
14 Bob. I don't know, again, the locations, if they
15 were together or not.

16 Q. Okay.

17 And this is when the conversation as
18 you described it where Mr. Charm was objecting
19 fairly strongly to a provision that provided NAM
20 significant flexibility.

21 Is that correct?

22 A. Yes. His issue was that issue. A
23 lot of the other time was really focused on the
24 gross profit calculation. Those were the two
25 points, as I remember, spending time on with him.

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2 Q. And I think you said that Les
3 objected fairly strongly and told Ann and Bob this
4 was problematic?

5 A. Yes.

6 Q. And he told them that in your

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7 presence or he told you that he had told them that
8 prior to the conference call?

9 A. On the phone. It was an issue. It
10 was an issue from a negotiation point that he was
11 representing that it may be a very difficult one to
12 get over.

13 Q. Okay.

14 And was he having -- and I apologize
15 for what may be a mundane question -- was Mr. Charm
16 having this discussion with Ms. Raider and
17 Mr. Fireman while you were on the phone or was he
18 recounting to you a prior conversation he had had we
19 them?

20 A. While we were on the phone.

21 Q. And what was Ms. Raider and
22 Mr. Fireman's response to Mr. Charm's comment that
23 this was problematic?

24 A. I remember them taking a break to
25 talk about it.

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2 Q. Okay.

3 And did the conference call
4 terminate?

5 MR. KATZ: Ever?

6 A. I don't recall exactly. I believe
7 that we did get back on the phone. It was an
8 outstanding issue.

9 Q. So ultimately when the conference
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10 call resumed, what, if anything, did Mr. Charm,
11 Ms. Raider, or Mr. Fireman say about this concern
12 that Mr. Charm had raised?

13 A. I think they were going to -- it
14 wasn't something that they could resolve at that
15 point. It was something that they had to take under
16 further consideration.

17 Q. Okay.

18 And do you remember any follow-up
19 conversations substantively about this point with
20 anybody on the CCMi side?

21 A. No.

22 Q. You never heard back from them one
23 way or the other as to whether --

24 A. We did hear back because it ended up
25 the term was accepted in the agreement. I just

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2 don't recall any specific -- I'm certain there must
3 have been conversations after that point regarding
4 that particular language in the document. I just
5 don't recall specific conversations.

6 MR. RICH: Mark this, please, as the
7 next exhibit.

8 (Exhibit DeVoe-18, 1-page fax
9 transmittal sheet dated 7-7-99, 1-page
10 document entitled CCMi Acquisition Open
11 Business Issues, and four fax log reports,

EXHIBIT B

Shan Willis

From: DeVoe Jr, Dave [ddevoe@newsamerica.com]
Sent: Monday, July 12, 1999 1:33 PM
To: Shan Willis
Subject: FW: ccmi

REDACTED

> -----Original Message-----

> From: Chamles@aol.com [SMTP:Chamles@aol.com]
 > Sent: Sunday, July 11, 1999 9:31 PM
 > To: DeVoe Jr, Dave
 > Cc: rfireman@ccmi-net.com; sduggan@gph.com
 > Subject: ccmi

>
 > i hope your weekend was a good one. a few points. it seems clear
 > where
 > we are headed. not a lot of protection to ann and bob. so give
 > us
 > as much as you will now and lets not spend a long time talking about.
 >
 > with respect to the \$1,500,000 clause as i call it. words from you
 > would
 > be helpful.... like some words about good faith, no diverting business
 > from ccmi to other divisions or taking elsewhere, state that the plans
 > are
 > to use sales people of other divisions, no allocation of costs, or
 > purchasing
 > profits ending up elsewhere etc. you no what we need.....
 >
 > since there isn't going to be a lot of protestion lets deal with the
 > budgets in exactly the way you want ... state in the agreement that
 >
 > you think the budgets are fair and reasonable from what you know about
 > other
 > companies in the newsamerica package and that they are reasonable given
 > the
 > growth rate that everybody is expecting. it doesn't seem to make a lot
 > of
 > sense to keep going back on the numbers.... (i still believe that gross
 > margin would be a better test) however i suggest the following
 > changes...
 > take your numbers for the budget and compare to the baseline
 > computations(oh one exception -i took out from your budget the taxes
 > and
 > fringes since and and bob can't control that) and i computed YEAR BY
 > YEAR
 > a % which would equate the earnings that would have existed under the base
 >
 > line and what now exists. that makes the earning ratio for each of the
 > 5
 > years-- yr1. - 17.5 % yr2 - 14.7 % yr3 - 13.9% yr4-
 >
 > 13.4% etc and you can calculate yr 5 as i am running out of time.
 >
 > es away from the average calcuulation the weighting of the 5th year. i
 >
 > believe you will find this fair as it pays out the same if the numbers all
 >
 > work out as budgeted. also agree that first year one time cost what

